RECORD AND BRIEFS

No. 10-1044

Supreme Court, U.S.
FILED
MAY 27 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ED STRICKLAND and
NORTHLAKE MARINE WORKS,
a Washington corporation,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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May 27, 2011

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A. ARGUMENT IN REPLY

1. THE CITY OF SEATTLE MISCHARACTERIZES THE UNDISPUTED FACTS CONCERNING THE COMPELLED PRIVATE SPEECH AT ISSUE.

The City of Seattle argues that Ed Strickland was free to say whatever he wanted to his marina tenants. *Brief in Opposition to Certiorari*, at 4-5. The undisputed facts show, on the contrary, that the City told him "both what to say and what *not* to say," to borrow the words of *Riley v. National Federation of the Blind*, 487 U.S. 781, 797 (1988) (emphasis in original).

a. Strickland's speech was restrained.

The City does not deny that it withheld approval of Strickland's marina project solely because he refused to remove a political statement – highlighting the City's role in water pollution – from a "best management practices" (BMP) plan which the City required him to write for his marina tenants. App. 13. Thus, it is not true that Strickland could speak freely: the City imposed a speech restraint as a condition of his project permit.

b. Strickland was prevented from attributing the compelled speech to the City.

The record shows that Strickland tried to attribute the marina BMP plan to the City, which would

have indicated to readers that the plan was government speech and not private speech. App. 12. But the City required him to identify his private marina as the speaker instead. App. 13. Where Strickland had written that the "**City** [has] established these Best Management Practices," a City employee rewrote the plan to say that "**Northlake Marina** established these Best Management Practices." App. 12-13 (bold added). Thus, the City mischaracterizes the undisputed facts by asserting that "[t]here is no evidence that Strickland ever asked to attribute the BMPs to the City or that the City ever told him he could not make that attribution." *Brief in Opposition to Certiorari*, at 7.

c. Strickland always said he disagreed with the censored message.

The City erroneously suggests that Strickland is changing his tune by asserting "for the first time" in this Court that he disagrees with the message of the BMP plan approved by the City. *Brief in Opposition to Certiorari*, at 6. In fact, Strickland discussed his disagreement from the outset. He explained in the District Court that merely describing ways to prevent pollution, without alerting tenants that Lake Union was already seriously polluted due to City sewage-dumping, would not sufficiently convey the importance of following the prescribed best practices:

> I wrote the statement about the City's sewage dumping ("the Political Statement") based on my awareness that Lake Union was severely polluted by the City's "combined

sewer overflow" problem. I had read newspaper articles describing the problem and, as a marina owner, I had directly observed it. It was my understanding and belief that whenever it rained heavily in Seattle, the City's sewers were overwhelmed, causing pipes that normally discharge only stormwater to release a combination of stormwater and raw sewage. As a result of this overflow problem, untreated sewage containing bacteria and toxins entered Lake Union. As a marina owner, and as a former science teacher, I was greatly concerned about the environmental harms caused by the City's sewer overflows. I knew from news reports that sewage dumping was the biggest source of water pollution in Seattle.

I included the Political Statement in the introductory paragraph to my proposed BMP plan because I thought it would get my tenants' attention and increase their motivation to take pollution prevention seriously, and also because I thought all people in Seattle should be aware of the sewer overflow problem so that they would support the necessary reforms.

. . . I did not want to make my political statement separately from the BMP plan, as [City employee Margaret] Glowacki had suggested. I felt that my BMP plan needed to have a compelling opening paragraph in order to get the attention of my marina tenants. **After all, the plan would not work if nobody wanted to read it.** Also, I felt

> that my tenants should know about the problems caused by the City, to increase their motivation to follow best practices and to help explain why best practices were needed. Besides, I have a First Amendment right to political speech, and I wanted to exercise that right.

Ninth Cir. Excerpts of Record, at 58-60 (Strickland Dec., ¶16, 17, 22) (bold added). Similarly on appeal he argued that he:

> felt strongly that his BMP plan should have a compelling opening paragraph. ER 59, ¶22. He felt that, without one, the plan might fail to get the attention of his moorage tenants, in which case its pollution prevention purpose would be defeated.

Appellant's Opening Brief, at 8, 12. In sum, contrary to City assertions, Strickland made clear from the outset that he disagreed with the message of the censored BMP plan, because it would not be effective without describing the serious pollution already caused by the City.[1]

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[1] The City claimed it censored the statement about sewage-dumping in part because the plan reviewer did not know if it was true. App. 13. Not only was the City's sewage problem well publicized, as noted above, but Circuit Courts have recognized that storm sewers are the biggest source of water pollution. *Appellant's Reply Brief*, at 24-25, quoting *Environmental Defense Center v. EPA*, 344 F.3d 832, 840-41 (9th Cir. 2003) ("Stormwater runoff is one of the most significant sources of water pollution in the nation") and *City of Abilene v. EPA*, 325 F.3d 657, 659 (5th Cir. 2003).

2. THE CITY'S CONTENTION THAT SPEECH ABOUT POLLUTION PREVENTION CAN BE COMPELLED BECAUSE IT IS NOT "IDEOLOGICAL" CONFLICTS WITH THIS COURT'S FREE SPEECH JURISPRUDENCE.

Pointing to language in *Wooley v. Maynard*, 430 U.S. 705 (1977), the City contends that this Court struck down New Hampshire's compelled display of the license-plate motto "Live Free or Die" on the sole basis that it was an "ideological message" that the citizen motorist disagreed with. *Brief in Opposition*, at 14. But this Court has flatly rejected the City's contention that First Amendment protection against compelled speech is limited to "ideological" messages. For example, in *Riley*, 487 U.S. at 797, this Court said that the prohibition on compelled speech applies to "compelled statements of fact," and not only to "compelled statements of opinion." In *Riley*, this Court struck down a North Carolina regulation requiring professional fundraisers to disclose to potential donors the percentage of collected donations actually turned over to charity in the prior year. *Id.* at 798. Such forced disclosures had nothing to do with ideology, yet were unconstitutional, contrary to the City's arguments.

Even if the City was correct that the First Amendment protection against compelled speech applies only to political or ideological statements, the compelled speech in this case would still be unlawful. By requiring Strickland to tell his marina tenants how to

prevent pollution, without permitting him to explain that the City is the biggest polluter of Lake Union, the City effectively made a political statement that boaters rather than city sewers are the real problem and that its own practices are not worthy of attention.

3. THE CONTENTION THAT ONLY A "SPECIFIC MESSAGE" TRIGGERS THE FIRST AMENDMENT CONFLICTS WITH *HURLEY*.

The City's contention that the First Amendment affords Strickland no protection unless the BMPs contained some "specific message" that he did not want to be associated with is in direct conflict with this Court's holding in *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group*, 515 U.S. 557 (1995). There, this Court held that "a narrow, succinctly articulable message is ***not*** a condition of constitutional protection, which, if confined to expressions conveying a 'particularized message' [citation] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley* at 569 (emphasis added).

The City emphasizes that Strickland did not object to the particular practices prescribed in the BMP plan, as if that means he endorsed the overall message. *Brief in Opposition*, at 14. It means no such thing, as explained above. Moreover, under the City's reasoning, if a citizen cares about global warming but disagrees with the government about its cause, the government could compel the citizen to disseminate

its message as to what it believes is the major cause of global warming simply because the citizen "agrees with . . . the ultimate goal of preventing" global warming. *Brief in Opposition*, at 14. There is no authority for such a proposition.

4. THE CITY FAILS TO RECOGNIZE THIS COURT HAS CONSISTENTLY PUT THE BURDEN OF PROOF ON GOVERNMENT TO JUSTIFY CONTENT-BASED SPEECH RESTRICTIONS.

The Court below ruled that "there is no evidence indicating that Strickland could not have dispelled any notion that he might be associated with the City's BMP plan, perhaps by including a statement in the plan that its contents were subject to the City's approval and regulations." App. 19. The City argues that this ruling was correct, and claims that Strickland's First Amendment claim was properly rejected "because Strickland has not shown that the City would have objected if Strickland had proposed a BMP plan that attributed the BMP's to the City." *Brief in Opposition*, at 13-14.

As an initial matter, the suggestion that use of a disclaimer would solve any constitutional compelled-speech problem is of doubtful validity. It conflicts with the decision in *Pacific Gas & Electric Co. v. Public Utilities Commission of Cal.*, 475 U.S. 1, 15 n.11 (1986), where this Court held that the presence of a disclaimer – stating that the utility was not

endorsing the message it was required to disseminate – would *not* render it permissible to compel speech which the utility disagreed with.

Second, as explained above, the City deleted the reference to the City as the author of the BMP plan, and substituted the name of Strickland's marina. Thus, as a factual matter Strickland *did* show that the City had refused to allow him to attribute the BMP plan to the City.

Third, and most significantly, the City's contention that Strickland should bear the burden of proof flies in the face of this Court's precedents regarding the allocation of the burden of proof in First Amendment speech cases. Here, the City prohibited Strickland from identifying the City as a major polluter of Lake Union and also prohibited him from identifying the City as the author of the BMP. This Court has consistently held that the burden of proof is on Government to justify such content-based restrictions on speech:

> When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based restrictions are presumptively invalid, *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and the Government bears the burden to rebut that presumption.'

United States v. Playboy Entertainment Group, 529 U.S. 803, 817 (2000). *Accord Freedman v. State of*

Maryland, 380 U.S. 51, 58 (1965) ("The burden of proving that[the expression] is unprotected must rest on the censor."); *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600, 620 n.9 (2003) ("The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected."); *Speiser v. Randall*, 357 U.S. 513, 528-529 (1958) (holding unconstitutional a law that required a taxpayer seeking a tax exemption to carry the burden of proof to demonstrate that his speech does not contain advocacy of criminal acts).

The majority opinion from the Court below conflicts with all of these precedents by holding that it was up to Strickland to prove that, if he had made a *second* attempt to persuade the City to let him attribute the BMP plan to the City, the City would not have acceded to that request. Not only is it practically impossible to prove what *would have* happened if a citizen had asserted his rights more forcefully, an inherently speculative venture, the majority's reasoning flips on its head the presumption that content-based restrictions are invalid and shifts the duty of protecting First Amendment rights from the government to the citizen. This is a dangerously wrong direction in conflict with this Court's precedents. *Playboy Entertainment Group*, 529 U.S. at 817; *Freedman*, 380 U.S. at 58.

5. THIS CASE PRESENTS INCREASINGLY COMMON ISSUES.

The City argues that this case is too unusual and "fact-bound" to merit this Court's attention. *Brief in Opposition*, at 4, 8. But as scholars have noted, "the roles occupied by government when it speaks are vastly multiplied in the modern state." R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 L. Rev. 1377, 1380 (2001). "[T]he use of speech by government is expanding and taking new forms," including "employing devices to conceal hidden government messages in private speech." *Id.* Contrary to the City's arguments, in this case where the government not only compelled private speech but refused to identify itself as the author and censored a statement critical of itself, it is hard to imagine a set of facts more conducive to clarifying the extent of government immunity from the First Amendment.

B. CONCLUSION

For the reasons stated above and in his petition, Ed Strickland asks this Court to grant a writ of certiorari to review the decision entered below.

DATED this 27th day of May, 2011.

Respectfully submitted,

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